87-5266

CASE NUMBER 87 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JERRY HERBERT JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals, Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a general verdict in a RICO cases must be set aside when the jury was instructed that it could rely on any two predicate acts of stolen property (copyright infringement activities) or wire fraud and the stolen property concept submitted to the jury is subsequently determined to be invalid if there is a meaningful probability that the verdict rested exclusively on the invalid allegations?

Whether **Dowling** constructively amends an indictment that had been interwoven with the conclusion that Section 2314 is broad enough to encompass copyright infringement activity?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

In addition to Jones and the respondent, the proceedings before the Eleventh Circuit Court of Appeals included George Washington Cooper, III, Ferrol "Bud" McKinney and John C. McCulloch. John C. McCulloch has filed a petition for writ of certiorari herein. This matter should be consolodated with any petition filed by others named herein.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases **Page**

STATUTES

Petitioner, Jerry Herbert Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on June 8, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit adopting the order and memorandum opinion of the District Court's opinion in **Cooper v. United States**, 639 F.Supp. 176 (M.D. Fla. 1986) is attached as Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on June 8, 1987. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

Initially, the focal point of this case was the interpretation and construction of Title 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). This statute is set forth in Appendix B. The operative facts here were characterized as copyright infringement activities in **Dowling v. United States,** 473 U.S. ____, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985).

Pertinent sections of the copyright statute, Title 17, Sections 106 and 506 are contained in Appendix C.

RICO convictions remain - a conspiracy in violation of Title 18, U.S.C. Section 1962(c) as defined by Title 18 U.S.C. Section 1961 and a violation of Title 18 U.S.C. Section 1961(4). Pertinent sections are contained in Appendix D.

STATEMENT OF THE CASE

On July 29, 1980, Jerry Herbert Jones was indicted in Jacksonville, Florida. The indictment is interwoven with references to Title 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). The

seventy-eight (78) count indictment names eighteen defendants.

A conspiracy in violation of Title 18, U.S.C. Section 1962(c) through a pattern of racketeering activity as defined by Title 18, U.S.C. Section 1961 is alleged in count one. The government premised the case against Jones on the concept that the aggregation of sounds fixed on copyrighted recordings were reproduced without authorization of the copyright owner and transported in interstate commerce and this activity violated Title 18 U.S.C. Section 2314. This RICO conspiracy was alleged to be an eight track and cassette tape copyright infringement scheme.

The alleged pattern of racketeering activity was that the defendants would cause to be transported in interstate commerce, goods, wares and merchandise of a value in excess of $5,000.00, this being the aggregation of sounds fixed upon the unauthorized tapes in violation of 18 U.S.C., Section 2314. Violations of Title 18, U.S.C. Section 1343 (information to avoid detection communicated between the parties to the scheme) and Title 18, U.S.C. Section 1341 (use of the mails to execute the scheme) are also alleged in count one as part of the conspiracy. That is - telephone communications and mails were utilized by defendants for the purpose of executing a scheme to defraud copyright owners.

Violations of Title 18 U.S.C. Section 1961(4) are alleged in count two which incorporates all allegations of count one; the violation is by reason of a group of individuals associating to operate an eight track and cassette tape copyright infringement scheme. The pattern of racketeering activity charged included violations of Title 18 U.S.C. Section 2314 which were alleged as substantive offenses in counts three through ten; these consisted of the interstate transportation of unauthorized copies of sound recordings. Violations of Title 18 U.S.C. Section 1343 (wire fraud) in implementing the substantive offenses are also alleged in count two and these

are charged separately as substantive offenses in counts eleven through forty-nine.

A violation of Title 18, U.S.C. Sections 106(1)(3) and 506(a) is alleged in count fifty consisting of a conspiracy to infringe the copyright in various sound recordings.

Jones urged in a motion to dismiss that the indictment was defective because the copyright infringements alleged were not sufficient to constitute an ITSP violation and the RICO counts were poisoned by the defective ITSP concept - because copyright infringements were not sufficient to constitute "stolen property" violations - these were being used as predicate offenses for the RICO violations. Motions to suppress raised the same point, the wiretaps utilized to gather evidence were authorized for the ITSP charges on the concept that a copyright infringement can be the underlying factual basis for a Section 2314 violation and defendants urged that the interception of wire communications authorized by Title 18, U.S.C. 2516 was not permissible on the facts submitted. The motions were denied.

After several weeks of trial, Jones was convicted of a RICO conspiracy, a RICO substantive offense, multiple ITSP counts, wire fraud and a conspiracy to violate a copyright. He was sentenced under each count.

The Eleventh Circuit rejected the appeal in **United States v. Drum**, 733 F.2d 1503 (11th Cir. 1984) stating:

> "We have previously noted that copyrights, once given tangible form, may be 'stolen, converted or taken by fraud' and fall within the reach of Section 2314"

This Court denied certiorari in this case, 105 S.Ct. 543 (1984). However, the same issue was dealt with in **Dowling v. U.S.**, 105 S.Ct. 3127, 87 L.Ed. 2d 152 (1985). **Dowling** vindicated the position of Jones and others who had contended that (misdemeanors) copyright infringement activities should not be construed as a theft of goods, wares or merchandise under Section 2314.

Relying on **Dowling**, Jones filed a motion pursuant to Title 28 U.S.C. Section 2255 seeking to vacate and set aside all convictions. Convictions on six counts (four through nine) pursuant to Section 2314 were set aside as to Jones - the motion was denied as to the RICO and RICO conspiracy convictions. This reduced Jones from a ten year sentence to a total aggregate sentence of five years. The trial court viewed this result as one which would thwart the sentencing plan. Jones and others were resentenced so they would have the orginal time of incarceration. No benefit in sentencing was derived from the fact numerous ITSP convictions had been set aside, **Cooper v. United States**, 639 F.Supp. 176 (M.D. Fla. 1986).

The judgment and sentence imposed after the ITSP convictions had been set aside was appealed. The Eleventh Circuit adopted the district court's opinion, Appendix A.

REASONS FOR GRANTING THE WRIT

It is impossible to ascertain whether convictions of RICO conspiracy and RICO are based upon criminal conduct. The focus of the indictment and trial was on copyright infringement activity but Jones was not charged with any copyright infringement. Jones was convicted of various violations of Section 2314 based upon copyright infringement activities and these substantive offenses have been vacated.

The government has no way of establishing that the jury did not rely exclusively on the Section 2314 violations in reaching the RICO conspiracy and RICO verdicts of guilty. The government has successfully urged that the wire fraud convictions can support the RICO convictions. There is nothing to support this alternative over the defective Section 2314 theory. Moreover, there is nothing to indicate that the jury did not rely upon the defective 2314 theory in reaching the verdicts of guilty on wire fraud - wire fraud being a parasitic offense requiring a host of some kind. Other hosts

are possible but nothing is more probable than the Section 2314 copyright concept which is not excluded in any way.

Count one of the indictment alleges a RICO conspiracy and contains the following allegation which marks the problem:

> "3. The said pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1) and (5) consisted of the following:
>
> a. It was part of said conspiracy that the defendants would directly and indirectly, knowingly, willfully and unlawfully transport and cause to be transported in interstate and foreign commerce goods, wares and merchandise of a value in excess of $5,000, that is, the aggregation of sounds fixed upon unauthorized and unlawfully made phonorecords and tapes of duly copyrighted sound recordings, knowing the same to have been stolen, converted and taken by fraud, that is, willfully and unlawfully reproduced without authorization of the copyright owner, for purpose of commercial advantage and private financial gain, which acts are indictable under Title 18, United States Code, Section 2314, including but not limited to those acts in a pattern of racketeeriing activity which are charged substantively in Counts THREE through TEN of this Indictment, which are realleged and incorporated by reference in this Count as if set forth fully herein.
>
> b. It was further a part of said conspiracy that defendants would directly and indirectly, willfully and knowingly transmit and cause to be transmitted in interstate commerce by means of a wire communication, certain signs, signals and sounds, that is, telephone communications, for the purpose of executing a scheme and artifice to defraud copyright owners, sound recording companies, recording artists and musicians, the public and other individuals and businesses dealing in & purchasing phonorecords, tapes and sound recordings, and thereby, . . ."

Count two alleges a substantive RICO violation. Count one is incorporated in count two.

Jones was convicted of violations of Section 2314 on the theory that a copyright infringement can form the basis for a theft of "goods, wares and merchandise" described in that statute. Jones was convicted in counts 13, 14, 15, 16, 17, 18, 19 and 21 of violations of Title 18, U.S.C., Section 1343 (Wire Fraud). The wire fraud counts allege that they were part of a scheme set forth in paragraph 3(b) of Count I. Paragraph 3(b) of Count one alleges that it was "a part of said conspiracy" that the defendants would utilize telephone communications.

1. The Conflict with Brown:

The writ should be granted in this case because of the direct conflict between **Jones**, the subject case from the Eleventh Circuit and **United States v. Brown**, 583 F.2d 659 (3rd Cir. 1978) cert denied, 440 U.S. 909 S.Ct. 1217, 59L.Ed.2d 456 (1979). The opinion and order denying relief to Jones, specifically acknowledges that if the rationale of **Brown** was applied, it would be necessary to set aside the RICO convictions. Instead, the reasoning in **United States v. Peacock**, 654 F.2d 339 (5th Cir. 1981), cert denied, 464 U.S. 965 (1983) was expanded beyond the limits of reason.

In **Jones**, RICO convictions have been upheld because two predicate acts are left after discounting the vacated convictions. After the Section 2314 convictions were vacated, wire frauds are identified as the acts relating to the criminal enterprise which the jury could have relied upon as the predicate acts necessary for the RICO convictions.

United States v. Brown, 583 F. 2d 659 (3rd Cir. 1978), is a RICO case; defendants appealed their convictions for using extortionate means to collect, for conspiracy, for mail fraud, for conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity and a RICO conpiracy.

On appeal, it was determined that the mail fraud counts were defective. The racketeering activity alleged consisted of the evidence underlying the substantive count of extortion and the counts of mail fraud. The jury was charged that a finding of guilt under two substantive counts could support a RICO conviction and RICO conspiracy conviction. Since the jury might have relied upon a mail fraud count, where the evidence was insufficient, in reaching verdicts on the RICO counts - the RICO convictions must be reversed. Substantive convictions and evidence sufficient to support RICO convictions remained but there was no way of ascertaining

which aspects the jury relied upon in reaching the verdicts.

2. The Conflict with Stromberg - Leary, Bachellar and Chiarella:

In other contexts, this Court has consistently expressed the view set forth by the Third Circuit in **Brown.** In **Stromberg v. California,** 283 U.S. 359, 51 S.Ct. 532, 75 L. Ed. 1117 (1930), Stromberg was convicted under a statute with three clauses pertaining to displaying flags or symbols in (1) opposition to organized government, (2) inviting anarchistic action or (3) as an aid to propaganda of a seditious character. There was a general verdict that did not specify the ground upon which it rested. The first clause was impermissibly vague and declared invalid. This required a reversal of the conviction since the jury may have based the verdict on the invalid first clause.

In **Leary v. United States,** 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-1546, 23 L.Ed.2d 57 (1967), A statute was declared unconstitutional which provided that a jury could infer from the fact of possession - that marijuana was illegally imported. The jury was instructed that it could base a verdict of guilt on either of two alternative theories - one being the challenged presumption that it was illegally imported. The unconstitutionality of one alternative required a reversal.

In **Bachellar v. Maryland,** 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), defendants participated in an anti-Vietnam War demonstration. Defendants were charged with disturbing the peace and being disorderly under a Maryland statute that permitted an instruction that authorized a guilty verdict if defendants engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." This provision was unconstitutional. The jury was instructed about alternative grounds upon which defendants might be found guilty. There was a general verdict that did not specify the basis for the

finding of guilt. Defendants may have been found guilty because they advocated unpopular ideas - the jury could have rested its verdict on any number of grounds but if it cannot be determined upon the record that the defendants were not convicted under the invalid clause - the conviction cannot be upheld.

In **Chiarella v. United States,** 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), an employee of a printing company obtained inside stock information and acted thereon. He was prosecuted under the theory that he owed a duty of disclosure to the sellers and violated Section 10(b) of the Securities Exchange Act of 1934. The majority concluded that this theory did not apply in this instance. The following is noted:

> "The conviction would have to be reversed even if the jury had been instructed that it could convict the petitioner either (1) because of his failure to disclose material, nonpublic information to sellers or (2) because of a breach of a duty to the acquiring corporation. We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. **United States v. Gallagher,** 576 F.2d 1028, 1046 (CA3 1978); see **Leary v. United States,** 395 US 6, 31-32, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969); **Stromberg v. California,** 283 US 359, 369-370, 75 L.Ed. 1117, 51 S.Ct. 532, 73 ALR 1484 (1931)."

This Court has been quick to apply the **Stromberg** rule where the jury could have considered constitutional activities as criminal conduct and more hesitant to apply **Stromberg** in the sentencing context. see **Kant v. Stephens,** 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983) and the discussion therein.

These factors do not in any way blunt the claim of **Jones** that the reasoning inherent in **Stromberg** should be applicable in his case.

3. The Conflict With Non-RICO Conspiracies:

There is no apparent reason to confine the **Stromberg** rule to single count indictments. A catalog of cases consistently apply the concept in multiple count indictments - a court cannot speculate on the basis for a jury verdict when it could rest on valid or invalid grounds. The most frequent incident

in conspiracy cases is where the evidence is insufficient in some respect.

United States v. Dansker, 537 F.2d 40, (3rd Cir. 1976), **United States v. Tarnapol,** 561 F.2d 466, (3rd Cir. 1977), **United States v. Carman,** 577 F.2d 556 (9th Cir. 1978), **United States v. Irwin,** 654 F.2d 671 (10th Cir. 1981), are conspiracy cases in which the evidence was deemed insufficient on an underlying substantive offense which also could have been a basis for a verdict of guilty on conspiracy. Each case required reversal because it could not be determined whether the conspiracy verdict was on an object deemed insufficient.

The same result was reached in **Van Liew v. United States,** 321 F.2d 664, 672 (5th Cir 1963) and **United States v. Kavazanjian,** 623 F.2d 730 (1st Cir. 1980), where an underlying substantive offense was set aside as non-criminal under the facts.

4. The Limit of Peacock:

The **Brown** rule is that any underlying substantive offense that is defective and which could have formed the basis for RICO convictions requires a reversal of the RICO convictions absolutely. In **Peacock,** there was a reversal of an underlying substantive offense and the RICO convictions were sustained. **Peacock** does not say that any substantive offense which could possibly form the basis for the predicate acts of a RICO conviction will safeguard RICO convictions. **Jones** goes beyond **Peacock** since implicit in the **Jones** result is the rule that where featured substantive offenses that could have been the basis of the jury verdict are known to be defective, any substantive offenses that the jury could have relied upon will safeguard the RICO convictions. In **Jones,** there is no requirement of any certainty in the verdict.

In **Peacock,** there was a racketeering enterprise characterized as "an arson ring" - the evidence and counts were carefully reviewed and on the record, it was determined

that some of the counts operated like special verdicts and it could be conclusively determined that each defendant had been found by the jury to have been guilty of at least two racketeering acts which were related to the arson enterprise. The insufficient evidence on incidental counts which could have also been underlying predicate acts did not require reversal where the record precluded any doubt as to the propriety of the RICO convictions.

The record in **Jones** does not permit the construction of a substitute for a special verdict. Based on the indictment, evidence and instructions - there is no reason to believe that the jury did not rely exclusively upon the defective Section 2314 theory. In **Jones,** a criminal conviction has been upheld when it is not possible to ascertain whether the defendant is being punished for criminal or non-criminal conduct. This is beyond **Peacock. Peacock** recognized a need for some reasonable certainty in a verdict.

5. Amended Indictment, Reasonable Doubt and Due Process:

At every stage - the indictment, motions, evidence, argument and instructions, the government position was that pirated tapes form a proper basis for charging a violation of 18 U.S.C., Section 2314, which in turn provides a proper basis for establishing the predicate acts necessary for the RICO convictions. The jury was necessarily influenced by these alleged Section 2314 violations because they returned guilty verdicts thereon. The perspicuous risk is that the jury was misled and relied on the invalid predicate acts.

Dowling removes major portions of the indictment subsequent to the trial. Thus, defendants were not tried on the indictment as it now reads. At trial, the RICO and wire fraud counts were not independent of the Section 2314 defect. It cannot be presumed what indictment would be returned by a grand jury had the grand jury been aware that the ITSP

allegations were a nullity.

Rule 7(c), Federal Rules of Criminal Procedure provides:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Rule 7(e), Federal Rules of Criminal Procedure provides:

> "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

It cannot be argued that Jones was tried on a plain and concise statement of the essential facts of the offense charged when the indictment contains material purporting to be allegations of fact which are an erronerous interpretation of a statute, 18 U.S.C. Section 2314.

No grand jury has returned the indictment as it is modified by **Dowling**. The Fifth Amendment of the Constitution of the United States provides in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."

The government cannot say that the grand jury was not influenced by the concept of the subject facts triggering the provisions of Title 18, Section 2314. It is unknown what form the indictment may have taken if the grand jury had been apprised that copyright infringements were misdemeanors rather than felonies under Section 2314.

Russell v. United States, 369 U.S. 749 770-772, 8 L.Ed 2d 240, 82 S.Ct. 1038 (1962) states it is settled that an indictment may not be amended except by grand jury. The purpose of the requirement of a grand jury indictment is to limit the power of both the prosecuting attorney and judge. It is not uncommnon for an indictment to be narrowed - counts are dropped without this constituting an amendment, **United States v. Miller,** 471 U.S. 130, 107 S.Ct. 1811, 85 L.Ed.2d 99 (1985). This occurs when the counts are independent. The situation is different here - the counts are interwoven with the Section

2314 theory. An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. The offense charged by the grand jury is one in which Section 2314 is violated by copyright infringement activities and these felonies are predicate acts for a RICO enterprise and the basis of a RICO conspiracy. Separating after trial what was united in the trial is a risky business not only for a defendant but for the integrity of the judicial process.

Except for **Jones**, implicit in each decision dealing with a **Stromberg** problem, is the concept that reasonable doubt exists as a matter of law when the record and verdict do not permit any certainty as to the basis of guilt and the verdict could have been on defective grounds. If a jury has condemned a defendant for reasons that as a matter of law cannot support the verdict, this may offend the Due Process Clause.

6. The Importance of the Question Presented:

Jones has been incarcerated for several years so this is more than an academic question for the individual. The issue presented is not some after thought contrived for an appellate point. Prior to trial, Jones challenged the government theory of copyright activity being within the purview of Section 2314. Jones also precisely identified this mischief - defective predicate acts being utilized in the indictment for the RICO counts.

The legislative history of the RICO statutes leaves no question about the intent of Congress - these are additional weapons with enhanced penalties designed for exceptionally heinous criminality. Here, the prosecution selected misdemeanors - copyright infringement activities as a target of the RICO statutes. In this setting, it may not be appropriate to provide the government with the ability to convict without knowing whether the jury based the verdict of guilty on criminal conduct.

The number of RICO cases currently being prosecuted and the nature of the offenses - optional predicate offenses within an offense - creates a situation which needs some pronouncement from this Court. **Brown** seems to say that the concept of a conviction being based on the exclusion of reasonable doubt means that no ponderable risk is acceptable. **Jones** permits a verdict to remain intact when it is completely unknown whether vacated offenses were the basis for RICO convictions - rejecting the precepts of **Stromberg** and its progeny in the context of RICO cases. Applying some facet of the **Stromberg** rationale in a RICO case must be appropriate. The prosecution can fully protect cases by special verdicts or by refraining from drafting speculative indictments. The disparity between **Brown** and **Jones** does not satisfy the need for the uniform application of a criminal statute.

CONCLUSION

The jury was instructed that it could convict a defendant who agreed to commit any two of the Section 2314 counts or wire fraud counts. Wire fraud does not require an agreement and may be performed by one person, **Isaac v. United States**, 301 F.2d 706 (8th Cir. 1962). It is not known what particular scheme was perceived by the jury in returning the wire fraud convictions. Denying relief sought in the Section 2255 motion, the trial court noted that the wire fraud counts did not include an allegation that the fraud consisted of the interstate transportation of stolen property. But! The wire fraud counts do not reference the copyright statute either. No juror had any reason to suspect that the alleged Section 2314 activity could not be considered as a basis for wire fraud violations. So far, the prosecution has not shown why the jury did not rely exclusively on the Section 2314 theory in reaching the RICO convictions - or how it is known that the jury did not rely exclusively on the invalid predicate acts.

The possibility that the jury could have considered the copyright statute in finding wire fraud and the possibility that the jury relied on wire fraud in reaching the RICO verdicts does nothing in the way of providing a solution. The problem is that there is nothing in the record which provides any assurance that the jury relied on anything except the defective Section 2314 theory. Jones is incarcerated not on the basis of the indictment that was returned and the verdict thereon but a guess from the prosecutor and judiciary as to what may have been involved in the deliberations - or would be on the indictment as it now reads.

A RICO conviction cannot be permitted to rest on some random guess. The result must be reversed on the rationale of **Brown** and **Stromberg** which require that there be some reasonable certainty as to the acts the jury found were part of the RICO enterprise and what agreement existed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed three copies of the petition for writ of certiorari on behalf of petitioner, Jerry Herbert Jones, dated August 7th, 1987, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 7th day of August, 1987 and a copy of the foregoing petition for certiorari has been furnished to:

Curtis S. Fallgatter, Esquire
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by mail, this 7th day of August, 1987.

Attorney

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 86-3452

D.C. Docket No. 80-67

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY HERBERT JONES,
FERROL "BUD" McKINNEY, and
JOHN C. McCULLOCH,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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Before RONEY, Chief Judge, FAY, Circuit Judge, and ATKINS*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED.

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*Honorable C. Clyde Atkins, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

Entered: June 8, 1987
For the Court: Miguel J. Cortez, Clerk
By: David Maland
Deputy Clerk

ISSUED AS MANDATE: JUL 13 1981

Before RONEY, Chief Judge, FAY, Circuit Judge, and ATKINS*, Senior District Judge.

PER CURIAM:

The judgment appealed is AFFIRMED based upon the district court's opinion in Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986).

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation

APPENDIX B

18 U.S.C. Section 2314

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

APPENDIX C

17 U.S.C. Section 106. **Exclusive rights in copyrighted works**

Subject to sections 107 through 118 (17 USCS Sections 107-1181), the owner of copyright under this title (17 USCS Sections 101 eet seq.) has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies of phonorecords;

(2) to distribute derivative works based upon the copyrighted works;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes and pictorial graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

(Added Oct. 19, 1976, P.L. 94-553, Title 1, Section 101, 90 Stat.2546.)

17 U.S.C. Section 506. **Criminal offenses**

(a) Criminal infringement. Any person who infringes a copyright willfully and for purposes of commercial advantage or private financcial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: Provided, however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsection (1),(2), or (3) of section 106 [17 USCS Section 106 (1).(2), or (3)] or the copyright in a motion picture afforded by subsections (1), (3), or (4) of section 106 [17 USCS Section 106(1),(3) or (4)] shall be fined not more than $25,000 or imprisoned for the first suc: offense and shall be fined not more than $50,000 or imprisonec for not more than two years, or both, for any subsequent offense.

(2) Forfeiture and destruction. When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

(c) Fraudulent copyright notice. Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows is to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such

notice or words that such person knows to be false, shall be fined not more than $2,500.

(d) Fraudulent removal of copyright notice. Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined no more than $2,500.

(e) False representation. Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409 [17 USCS Section 409], or in any written statement filed in connection with application, shall be fined not more than $2,500.

(Added Oct. 19, 1976, P.L.94 --553, Title 1, Section 101, 90 Stat. 2586.)

APPENDIX D

(Pertinent RICO provisions)

18 U.S.C. Section 1962. **Prohibited Activities.**

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C. Section 1961. **Definitions.**
As used in this chapter --

(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 210 (relating to bribery), Section 224 (relating to sports bribery), Sections 471, 472 and 473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment) if the act indictable under Section 659 is felonious, Section 664 (relating to embezzlement fromm pension and welfare funds), Sections 891-894 (relating to extortionate credit transactions), Section 1084 (relating to the transmission of gambling information), Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud), Sections 1461-1465 (relating to obscene matter), Section 1503 (relating to obstruction of criminal investigations), Section 1511 (relating to the obstruction of State or local law enforcement), Section 1951 (relating to interference with commerce, robbery or extortion), Section 1952 (relating to racketeering), Section 1953 (relating to interstate transportation of wagering paraphernalia), Section 1954 (relating to unlawful welfare fund payments), Section 1955 (relating to prohibition of illegal gambling businesses), Sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), Sections 2314 and 2315 (relating to interstate transportation of stolen property), Section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), Sections 2341-2346 (relating to trafficking in contraband cigarettes), Sections 2421-24 (relating to white slave traffick), (c) any act which is indictable under Title 29, United States Code, Section 186 (dealing with restrictions on pyments and loans to labor organizations), or Section 501(c) (relating to embezzlement from union funds), (d) any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any

law of the United States, or (e) any act which is indictable under the Currency and Foreign Transportations Reporting Act;"

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;